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Supreme Court of the United States

OCTOBER TERM, 1943. No. 461.

GEORGE F. SALOMON,

Petitioner,

against

THE CITY OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

November 16, 1943.

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Solicitor for Respondent,
The City of New York.

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Petitioner seeks a review of an order of the Circuit Court of Appeals, Second Circuit, filed on June 29, 1943, unanimously affirming, with an opinion (R. 76-77, 92), an order of the United States District Court for the Southern District of New York. The order of the District Court, dated December 18, 1942, made upon the application of the City of New York (R. 6-23), enjoined petitioner from further prosecuting an action instituted by him on June 1, 1942, against the City, in the New York Supreme Court (R. 66-67). The District Court also wrote an opinion (R. 61-65).

Petitioner is a holder of 7% Guaranteed Stock of Manhattan Railway Company (hereinafter referred to as "Manhattan"). He instituted the action against the City in the State Court to recover $21,840 dividend rentals allegedly accruing after October 1, 1932, under a lease (herein called the "Manhattan Lease") made in 1903, by Manhattan to Interborough Rapid Transit Company (hereinafter referred to as "Interborough"), which, *inter*

alia, provided that Interborough was to pay 7% dividends on Manhattan's capital stock (R. 23-27; 28-29; Manhattan Lease [printing omitted pursuant to stip., R. 73]).* His claim against the City is based upon the bare assertion (R. 25) that the City, in acquiring the Interborough properties on June 12, 1940, pursuant to the decrees of the District Court and the Interborough-Manhattan Unification Plan, "succeeded to and assumed the respective positions, rights and obligations of said Interborough Rapid Transit Co. and of the Manhatttan Railway Co. under any and all existing agreements."

(1)

On January 26, 1940, Judge PATTERSON, who was in charge of the Interborough-Manhattan receiverships, entered an order directing that, after notice to all parties and security holders by mail and publication, hearings be held before him for proof and argument on Manhattan claims against Interborough and on Interborough's cross-claims (R. 12-13). Such hearings were thereafter held (R. 13). In *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co., supra,* 122 F. (2d) 454, cert. den. 315 U. S. 801, the Court said (122 F. [2d], at p. 458):

> "A final determination of these claims and cross-claims would have involved protracted litigation with no assurance of ultimate benefit to Manhattan

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* The history and complexity of the legal relations between Interborough, Manhattan, their respective security holders, and the City, are fully set forth in *Manhattan Railway Co.* v. *Central Hanover Bank & Trust Co.,* 99 F. (2d) 789 (2nd Cir., 1938), cert. den. *sub nom. Manhattan R. Co.* v. *Merle-Smith,* 306 U. S. 641 (1939); *Murray* v. *Roberts,* 103 F. (2d) 889 (2nd Cir., 1939); *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.,* 112 F. (2d) 669 (2nd Cir., 1940); *American Brake Shoe & F. Co.* v. *Interborough R. T. Co.,* 122 F. (2d) 454 (2nd Cir., 1941), cert. den. *sub nom. Manheim* v. *Merle-Smith,* 315 U. S. 801 (1942), and in the interest of brevity will not be restated here.

> security holders. The claims were resolved and compromised by way of a class suit and under Rule 23 of the Rules of Civil Procedure * * *."

The hearings resulted in an order dated March 15, 1940, in which Judge PATTERSON allowed and established an $18,000,000 Settlement Fund to be apportioned and paid to the four classes of Manhattan security holders (122 F. [2d], at p. 458). This amount represented a balance in favor of Manhattan and its security holders on the conflicting claims. The sum of $1,202,073.40 of this Settlement Fund was allocated to the Manhattan 7% Guaranteed stock (R. 14).

The order found that all classes of Manhattan and Interborough securities were adequately represented at the hearings by parties before the Court, and all holders should be bound thereby (R. 14). It further expressly decreed that the claims of Manhattan stockholders for dividend rentals were thereby extinguished and that the stockholders were forever enjoined from asserting against the City of New York, among others, any of the claims, including claims for dividend rentals, for which allowances were made in said order (R. 15-16). The order also provided that all of Interborough's property, mortgaged and unmortgaged, directed by the Interborough decree of foreclosure to be sold, should be forever discharged from and held free and clear of the claims, among others, of holders of Manhattan 7% Guaranteed stock for unpaid dividend rentals (Manheim Record on Appeal* [incorporated by stip., R. 73], p. 416, fols. 1247-1248).

Thereafter, pursuant to the Interborough decree of foreclosure, its property was sold on March 11, 1940, to

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* This record on appeal is the one in which this Court denied certiorari in *Manheim* v. *Merle-Smith*, 315 U. S. 801, *supra*.

J. P. Morgan, and others, as a Protective Committee for Interborough First and Refunding Mortgage bonds (Manheim Record on Appeal, p. 274, fol. 821). On June 12, 1940, Judge PATTERSON signed an order confirming said sale (R. 57, 63). That order contained a finding that the March 15, 1940, Settlement Fund order had allowed specified amounts to Manhattan security holders upon their claims against Interborough, its receiver, its receivership estate and its security holders (Manheim Record on Appeal, p. 278, fols. 832-833); that each Manhattan security holder should be entitled to a *pro rata* share of the amount allocated to that class of security (*ibid.*); that Interborough's property should be forever discharged from and held free and clear of such claims (*ibid.*). The order further provided that Interborough's creditors were severally and perpetually enjoined from prosecuting against the J. P. Morgan Committee (the purchasers at foreclosure) their assigns, nominee, grantee or transferee (the City of New York), any obligation or liability of Interborough, or from seeking to impose liability upon such purchasers, their assigns, nominee, grantee or transferee upon any matter adjudicated by the final decree of foreclosure and sale (*ibid.*, pp. 287-288, fols. 860-863).

(2)

Manhattan stockholders did not receive anything as such; what they did receive they were allowed as creditors of Interborough. Manhattan's properties were subject to a prior lien of the Consolidated Mortgage. That mortgage was foreclosed in a related cause in December, 1939, upon a complaint originally filed in March, 1934, in which Interborough and its receiver were made parties (R. 30-33). The principal of the Manhattan mortgage debt was approximately $40,670,000, and, as the Circuit Court found,

the Manhattan properties would have to be worth more than $40,000,000 to leave any value whatever to the second mortgage lien ($4,500,000), let alone realize anything for the Manhattan stockholders. The upset price of $17,000,000 fixed by Judge PATTERSON for the foreclosure sale of Manhattan properties dispelled all hope of any equity therein for the junior Manhattan securities. The Circuit Court summed up the situation as follows (122 F. [2d], at p. 460):

> "Consequently the Manhattan stockholders did not receive anything as stockholders, but rather as general creditors of Interborough—a position the same as the Manhattan Second Mortgage Bondholders, who themselves were participating only as general creditors of Interborough—all Manhattan physical assets having been exhausted by the Manhattan Consolidated Mortgage prior lien."

On January 25, 1940, the Manhattan properties were sold in foreclosure to Van S. Merle-Smith, and others, as a Bondholders' Protective Committee (R. 33). All rights of Manhattan stockholders under the Manhattan Lease were specifically terminated and extinguished by the Manhattan foreclosure decree and the order of June 12, 1940, confirming the sale (R. 33-34).

On June 12, 1940, Judge PATTERSON also signed an order authorizing and directing the consummation of the Interborough-Manhattan Unification Plan (R. 17-21). Under it, holders of Manhattan 7% Guaranteed stock, assenting to the Plan by depositing their securities, would receive $31.55 per share in Corporate Stock* (R. 18). By its terms, Manhattan stockholders were severally perpetually enjoined from prosecuting against any of the parties to the Plan or any party to the receivership causes

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* A species of New York City bonds.

(the City being such a party) any suit or proceeding based upon any obligation or liability of Interborough or its receiver (R. 19-20).

The Plan was consummated on that same day, to wit, June 12, 1940. The City paid the purchase price and acquired title to the Interborough and Manhattan properties (R. 22, 34, 35, 38). Under the Plan, the City did not assume the Manhattan Lease or any obligations thereunder. Indeed, the Plan expressly excluded the Manhattan Lease from the agreements and obligations assumed by the City (R. 35-36; Manheim Record on Appeal, pp. 71-72, fols. 212-214).

(3)

Though almost all the Interborough and Manhattan securities were deposited, two Manhattan security holders, Paul E. Manheim, and Solomon G. Salomon (petitioner's father), prosecuted appeals to the Circuit Court from the decrees and orders made in connection with the Unification Plan. These included the orders of March 15 and June 12, 1940, referred to above. The Circuit Court, affirming said orders and decrees, and holding that the settlement of the conflicting Manhattan-Interborough claims had been resolved and compromised by way of a class suit, said (122 F. [2d], at p. 458):

> "As to the fact that the conflicting claims were compromised rather than fought out to the bitter end we believe that a compromise after full hearing on a full record with notice to interested parties is within that class of settlement recognized by Mr. Justice Douglas in Case *v.* Los Angeles Lumber Products Co., 308 U. S. 106, at page 130, 60 S. Ct. 1, at page 14, 84 L. Ed. 110, where he states: 'There frequently will be situations involving conflicting claims to specific assets which may, in the discre-

> tion of the court, be more wisely settled by compromise rather than by litigation.' We conclude that the compromise was proper and that Manheim was adequately represented in the determination of the amount of the Settlement fund."

As to the Plan itself, that Court said (p. 460):

> "The Plan represents a compromise of the conflicting claims of Manhattan and Interborough devised by the City in its program for unification. While it is true that the exact status of the parties and their rights as against each other have not been reduced to a certainty, we believe that compromise was justified."

The Court found that "it is obvious that every security holder is faring far better than ever would be the case but for the interest of the City" (p. 461).

In summarily disposing of all the contentions raised by Solomon G. Salomon, the Circuit Court said (p. 461), "These issues have wisely been set at rest." This Court denied the petition for a writ of certiorari. *Manheim* v. *Merle-Smith*, 315 U. S. 801, *supra*.

Notwithstanding the Circuit Court's affirmance of the orders and decrees referred to above, and this Court's denial of certiorari, and in express violation of the injunctive provisions contained in them, this petitioner, nevertheless, instituted the State Court action against the City.

(4)

It is apparent that petitioner misapprehends the basis for enjoining his State Court action because he speaks of this merely as a "relitigation" case (pet. for cert., p. 5). By orders and decrees of the District Court, affirmed by the Circuit Court, with certiorari denied by this Court, peti-

tioner had already been enjoined from prosecuting such action. Moreover, pursuant to such orders and decrees, substantial properties in the custody of the Federal Court had been conveyed to the City, as purchaser. As the Circuit Court of Appeals has held, in affirming the injunction here (R. 76-77), in order to effectuate its prior orders and decrees and to protect the City's title to property conveyed pursuant to them, the District Court properly and lawfully exercised its plenary equity powers in enjoining petitioner. Indeed, as the Circuit Court of Appeals stated (R. 77), the exercise of such powers in the circumstances is one of the exceptions expressly recognized by this Court in *Toucey* v. *New York Life Insurance Co.*, 314 U. S. 118 (1941), to which §265 of the Judicial Code, tit. 28, U. S. Code, §379, does not apply.

(5)

Our contention that the issue raised by petitioner is so unsubstantial as not to merit review rests upon the ground that petitioner, as a Manhattan security holder, was bound by the orders and decrees of the District Court which enjoined all Manhattan security holders from prosecuting any action against the City. The order here sought to be reviewed was made to effectuate those orders and decrees, and to protect the *res* in the custody of the Court and the City's title thereto, as purchaser. Consequently, the granting of that order was not in violation of §265 of the Judicial Code.

(a)

The inclusion of injunctive provisions in orders and decrees in connection with plans of reorganization in equity receiverships is of long standing practice and their validity and enforceability is unquestioned. In *Phipps* v. *Chicago R. I. & P. Ry. Co.*, 284 Fed. 945 (C. C. A. 8th,

1922), cert. granted 261 U. S. 611 (1923), dismissed per stipulation 262 U. S. 762 (1923), the Court said (p. 954):

> "The courts in this case had the same power to vest in the reorganized solvent corporation the title to the property of the insolvent corporation free from the claims against and stock in the latter, and to bar actions and suits against the reorganized corporation and against the property they delivered to that corporation, that the courts in the foreclosure cases had and exercised to protect the new corporations and the property which they delivered to them against like claims."

Evidently, petitioner has not been able to agree with the Court that the receivership issues "have wisely been set at rest." He did not deposit his stock under the Plan. But at the same time, he has refused to take a non-assenter's share of the Settlement Fund allocated to his class of security. Were petitioner afforded the right to prosecute his State Court action to the end, judgments and decrees, affirmed by the Circuit Court, with review refused by this Court, entered after years of expense in money and energy, with the different interests in these causes ably represented by eminent counsel throughout, would all come to nothing that is final. See dissenting opinion of Mr. Justice Reed (Mr. Chief Justice Stone and Mr. Justice Roberts concurring) in *Toucey* v. *New York Life Insurance Co., supra,* 314 U. S., at p. 144. What is more, he would thus be successful in forcing a relitigation of the issues already determined in these causes, and this in express violation of the injunction provisions contained in the March 15, and June 12, 1940 orders. To say that the Federal Courts, by reason of the provisions of §265 of the Judicial Code, are, in the circumstances,

powerless to effectuate their judgments and decrees and to protect transfers of title to property out of their custody, is to subvert the meaning and intention of the statute.

(b)

A long line of cases from *Hagan* v. *Lucas,* 10 Peters 400 (1836) to *Toucey* v. *New York Life Insurance Co.,* 314 U. S. 118, *supra,* has established the doctrine that the Court (whether Federal or State) which first takes possession of a *res,* withdraws it from the reach of any other. Furthermore, the Federal Courts have held that they will protect the title of a purchaser to property in their custody and sold by them under their decrees, notwithstanding §265 of the Judicial Code. It is also well established that these Courts in such circumstances will effectuate their decrees by use of their injunctive powers and make it unnecessary for a defendant to relitigate the issues in a State Court proceeding and to defend therein by pleading and proving the Federal decrees and judgments as *res judicata. Root* v. *Woolworth,* 150 U. S. 401, 411-412 (1893); *Farmers' Loan & Trust Co.* v. *Lake Street R. Co.,* 177 U. S. 51 (1900); *Julian* v. *Central Trust Co.,* 193 U. S. 93, 112 (1904); *Riverdale Mills* v. *Manufacturing Co.,* 198 U. S. 188, 195 (1905); *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 229 (1922); *Lion Bonding Co.* v. *Karatz,* 262 U. S. 77, 88-89 (1923); *Local Loan Co.* v. *Hunt,* 292 U. S. 234, 239 (1934); *Toucey* v. *New York Life Insurance Co.,* 314 U. S. 118, 135-136, 139, 145 (1941); *Pell* v. *McCabe,* 256 Fed. 512 (C.C.A. 2nd, 1919); *St. Louis-San Francisco Ry. Co.* v. *McElvain,* 253 Fed. 123, 131 (D. C. Mo., 1918); *Swift* v. *Black Panther Oil & Gas Co.,* 244 Fed. 20, 22-23, 26-27 (C.C.A. 8th, 1917); *Lang* v. *Choctaw, Oklahoma & Gulf R. Co.,* 160 Fed. 355, 359, 360 (C.C.A. 8th, 1908); *Fidelity*

Insurance Co. v. *Norfolk & W. R. Co.*, 88 Fed. 815, 820 (C. C., Va., 1898).

In *Toucey* v. *New York Life Insurance Co.*, 314 U. S. 118, *supra*, where this Court considered the so-called "relitigation" cases, it was made clear that §265 of the Judicial Code prohibits the Federal Courts from staying a proceeding in a State Court where the claim in controversy has been previously adjudicated by the Federal Court *in personam*. But it was also made clear that the prohibition contained in §265 does not extend to a situation in which the Federal Courts have exclusive control over a *res*, requiring the protection of an injunction. This Court expressly declared (pp. 135-136):

> "The rule has become well settled, therefore, that §265 does not preclude the use of the injunction by a federal court to restrain state proceedings seeking to interfere with property in the custody of the court."

This Court further said (p. 139):

> "We find, therefore, that apart from Congressional authorization, only one 'exception' has been imbedded in §265 by judicial construction, to wit, the *res* cases. * * * Furthermore, the *res* exception, having its roots in the same policy from which sprang §265, has had an uninterrupted and firmly established acceptance in the decisions. The rule of the *res* cases was unequivocally on the books when Congress reenacted the original §5 of the Act of 1793, first by the Revised Statutes of 1874 and later by the Judicial Code in 1911."

The dissenting opinion, of course, recognized that the *res* cases constituted an exception to §265. Mr. Justice REED said (p. 145):

> "There exists no divergence of view in regard to the power of federal courts to enjoin proceedings in state courts where the state action may embarrass or interfere with the federal court's prior control over a *res* which is in its possession. That is an exception to §265."

It is clear, too, that though a State Court action is brought after the *res* has passed from the hands of the Federal Court, the case is still regarded as a *res* case to which §265 does not apply. This was recognized in the *Toucey* case. In holding that the section does not apply to a *res* case, this Court cited the *Riverdale Mills* and *Julian* cases, *supra* (see 314 U. S., at p. 135, footnote). In both the cited cases, the *res* had passed from the custody of the Federal Court long before the State Court action was instituted. The fact, therefore, that title to the Plan properties here passed from the hands of the Court to the City, as purchaser, on June 12, 1940, should not prevent the District Court from enjoining the further prosecution of the State Court action instituted by petitioner in June, 1942.

Indeed, even where the subsequent State Court action is *in personam,* but where the Federal Court suit was *in rem,* the State Court action may be enjoined. *Bethke* v. *Grayburg Oil Co.*, 89 F. (2d) 536 (C. C. A. 5th, 1937), cert. den. 302 U. S. 730 (1937); *King* v. *Realty Mortgage Co.*, 107 F. (2d) 90 (C. C. A. 5th, 1939), cert. den. 309 U. S. 673 (1940). The *Bethke* case, *supra,* is particularly pertinent here. In that case receivers were appointed for defendants in a suit to foreclose a mortgage in the Federal Court. Plaintiff filed proof of claim for unpaid rentals under a lease. After hearings, the receivers were authorized to settle the claim. Plaintiff accepted the settlement and was paid. After termination of the receivership proceed-

ing, plaintiff brought suit in a State Court to recover the rentals due less the amount accepted in settlement. Defendant's application for an injunction to restrain the State Court action was opposed on the ground that defendant had a defense at law in the State Court (89 F. [2d], at p. 538). Upon appeal from the order granting the injunction, the question was whether the Court was prohibited from granting that injunction by §265, inasmuch as the State Court action was *in personam* (*ibid.*). The injunction was, nevertheless, granted, and this Court denied certiorari.

(c)

The March 15, 1940 Settlement Fund order recited (R. 14):

> "The holders of all classes of securities of Manhattan and of Interborough were, at said hearings, and now are, adequately represented by parties before this Court, and all holders of such securities shall be bound by this order."

In affirming the orders and decrees appealed from by Paul E. Manheim and Solomon G. Salomon, the Circuit Court found (122 F. [2d], at p. 458): "The claims were resolved and compromised by way of a class suit under Rule 23 of the Rules of Civil Procedure." The Court then cited *Hansberry* v. *Lee,* 311 U. S. 32 (1940), in which Mr. Justice STONE wrote (pp. 42-43):

> "It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties, *Plumb* v. *Good-*

> *now's Administrator,* 123 U. S. 560; *Confectioners' Machinery Co.* v. *Racine Engine & Mach. Co.,* 163 F. 914; 170 F. 1021; *Bryant Electric Co.* v. *Marshall,* 169 F. 426, or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter."

It is thus clear that even though petitioner may not have directly participated in these causes, he was, nevertheless, adequately represented and therefore "cannot complain that a decree was entered against him *in absentia* at the instigation of a class which did not properly represent him" (122 F. [2d], at p. 458). Not only that, but it is inconceivable that petitioner did not have full knowledge of everything which went on in these causes. He was living with his father, Solomon G. Salomon. Moreover, petitioner himself was personally present, as the record shows, at one hearing, at least, before Judge PATTERSON in January, 1940, when the foreclosure suits were being litigated. He is therefore bound by the orders and decrees entered in these causes and the express injunction against suing the City contained therein.

(d)

In his application for a rehearing in the Circuit Court of Appeals (R. 78-90), petitioner, as a measure of last resort, goes outside the record in an attempt to argue anew the question of the disaffirmance of the Manhattan Lease. This Court is well acquainted with the monotonous persistence with which, on every occasion, petitioner's father, Solomon G. Salomon, as a holder of Manhattan 7% Guaranteed stock, has pressed for reconsideration of

the disaffirmance issue, though it has long been disposed of. As recently as October 11, 1943, this Court denied Solomon G. Salomon's petition for certiorari to obtain a review of that very issue. *Salomon* v. *City of New York,* Oct. Term 1943, No. 243. Petitioner's present attempt merits the same disposition.

Conclusion

The petition for a writ of certiorari should be denied.

November 16, 1943.

Respectfully submitted,

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